

15, 1998. The present AMENDMENT sets forth and accords with the substance and results of that interview.

Initially, the May 1, 1998, Office action reiterated a restriction requirement previously imposed on the claims in the present application. Group I included Claims 1 to 59 drawn to a container. Group II encompassed Claims 60 to 87 and 113 to 138 for a method of making a container. Applicant's undersigned attorney had elected with traverse the claims of Group I for further prosecution during a telephone conversation with the examiner on April 14, 1998. Applicant now affirms his prior election and his traverse of the restriction requirement itself.

Simply stated, the inventions of the two groups derive from a single inventive concept. As such, they should receive examination in the same application. Accordingly, removal of the requirement is respectfully requested.

The May 1, 1998, Office action first rejected Claims 1 to 59 under 35 U.S.C. § 112, first paragraph. The rejection concerned a "second continuous barrier layer" and whether it appears in the claims. As discussed at the interview, the claimed structures provide the barrier when the container includes PCR. Accordingly, no violation of the cited statutory section occurs.

Similarly, the same Office action rejected the claims remaining under examination under 35 U.S.C. § 112, second paragraph, for various informalities. Applicant respectfully traverses this rejection.

In paragraphs 12 and 13 of the Office action, the examiner questioned the meaning of the terms "continuous" and "substantially [continuous]" respectively. However, as also discussed at the interview, the examiner's attention was drawn to the specification at page 6, line 24, to page 7, line 22, for a discussion of these phrases. As a consequence, no ambiguity can result.

The interview also clarified the use of "another" to mean "an other". As such, it provides a basis for "said other" in Claim 9.

A close, technical reading of Claim 59 shows that "said resin" can only (and correctly) refer to the "post-consumer recycled polyethylene resin" of (ultimately) Claim 44.

However, to minimize any difficulty in a facile understanding of Claim 59, it has received the additional verbiage given by the above amendment. This serves only to clarify the language of the claims.

Claim 1 was rejected under 35 U.S.C. § 102(b) as anticipated by Avery. Claims 2, 3, 21, and 22 were rejected under 35 U.S.C. § 103(a) as obvious over Avery. Claims 4, 6 to 15, and 18 to 20 were rejected under 35 U.S.C. § 103(a) as obvious over Avery in view of Moore et al. Claim 5 was rejected under 35 U.S.C. § 103(a) as obvious over Avery in view of Pearson et al. Claims 16 and 17 were rejected under 35 U.S.C. § 103(a) as obvious over Avery in view of Moore et al. and Strum et al. Claims 23, 24, and 26 were rejected under 35 U.S.C. § 103(a) as obvious over Cushing et al. Claims 23, 24, and 26 were rejected under 35 U.S.C. § 103(a) as obvious over Cushing et al. in view of Avery. Claims 25, 27 to 33, 35 to 39, and 40 to 43 were rejected under 35 U.S.C. § 103(a) as obvious over Cushing et al. in view of Avery and Moore et al. Claim 34 was rejected under 35 U.S.C. § 103(a) as obvious over Cushing et al. in view of Avery, Moore et al., and Strum et al. Claims 44 to 54 and 58 were rejected under 35 U.S.C. § 103(a) as obvious over Mehta et al. in view of Moore et al. . Claims 55 and 56 were rejected under 35 U.S.C. § 103(a) as obvious over Mehta et al. in view of Moore et al., and Avery. Claim 57 was rejected under 35 U.S.C. § 103(a) as obvious over Mehta et al. in view of Moore et al. and Strum et al. Applicant respectfully traverses these rejections.

Applicant's invention as set forth in the claims as presently amended involves the use of post-consumer recycled ("PCR") resins in containers that may well hold substances consumed by people. The critical problem requiring solution concerns preventing the consuming (eating or drinking) of undesirable substances from the PCR resins by human beings. The PCR may obtain the objectionable (to say the least) substances during its first use by consumers. As stated in the specification, the contaminants may take several unknown forms including, for example, toxic insecticides. To permit the use of the PCR resins in second generation containers requires keeping sufficiently low the level of harmful impurities obtained when the resins found prior use as part of containers with now unknown contents.

Additionally, the manufacture of the containers with the PCR's should not involve excessive additional costs. Hopefully, the use of the previously discarded PCR resins should result in a reduction of the container's final costs. In fact, the optimal situation would permit the use of the current equipment in the usual fashion to make the containers that incorporate the PCR plastic.

Additionally, Applicant's structure in Claim 1 achieves patentability without necessarily incorporating PCR's. That claim sets forth a container structure having a first layer of a polyethylene. A second layer has a substantially continuous film of a polypropylene occurring wherever the first layer is found and sits towards the container's interior. The second layer is formed on the surface of and in intimate contact with the first layer.

As discussed in the interview mentioned above, the claims, as presently amended, set forth Applicant's invention and serve to patentably distinguish from the cited references listed above. For the reasons given below, Applicant believes that the subject application is allowable over the cited prior art.

Avery starts with a container that may have seen previous use. He then takes a separate film and, in effect, places the film to cover the container to provide protection from any contaminants that the container may have acquired in its prior use. Applicant's claims have received the additional language of "formed on the surface of and in intimate contact with said first layer" to more particularly point out his invention. The second layer must be *formed* on the surface of the first layer. And, it must have intimated contact with the first layer. This allows for mass production of containers through, for example, coextrusion. This become a practical, achievable manufacturing process. Avery, in comparison, suggests finding old containers. Then one should get the desired film and then manipulate the latter to cover the former. This simply does not meet the present requirements that the second layer is formed on and has intimate contact with the first layer.

The additional references, whether taken alone or together, similarly do not teach or suggest Applicant's invention. Moore et al. show a container incorporating PCR's that will hold "liquid detergent products" (col. 1, lines 22 and 23) and "petroleum distillates"

(col. 5, line 26). Moore et al. do not intend that their container should provide edibles to a human being and thus does not provide any kind of a barrier. Furthermore, it has no combinability with Avery, which teaches placing a previously formed film over a previously formed container. Thus, Moore et al. provide no teaching that would lead one of ordinary skill in the art to produce Applicant's claimed invention.

Pearson et al. use ethylene-vinyl alcohol ("EVOH") for its well-known barrier properties against the passage of oxygen, water, and hydrocarbons. EVOH has found extensive use for this purpose, especially against oxygen. However, Pearson et al. do not discuss PCR's or their migration into consumable materials. As the examiner has noted, Pearson et al. mentions "scrap" resin. However, this represents plastic formed with other products that, without undergoing any use, is reground to provide more resin. This occurs, for example, when a defective article results from molding or from "flash", i.e., excess plastic made during molding but not forming part of the final product. "Scrap" does not include resins from containers that have undergone use to hold a product and now wish to find actual use a second time. Accordingly, Pearson et al. lacks relevance to and fails to provide the deficiencies of the other cited references.

Similar remarks apply to Strum et al. "Reground" does not mean "post-consumer recycled". As discussed above, the latter acquires all sorts of contaminants that must be kept out of contents intended for human ingestion. Strum et al.'s abstract points this out where it says, at the end, "which later are trimmed from the molded article and reprocessed for reuse". Again, Strum et al. do not overcome the deficiencies of the other references relative to Applicant's claimed invention.

As the examiner correctly notes, neither Cushing et al. nor Mehta et al. make reference to post-consumer recycled resins for use in containers holding substances for intended for human consumption. As discussed above, Avery does not teach layers in intimate as a barrier for the contaminant in PCR's. Further, Moore et al. fail to teach PCR's for use in such containers whatsoever. For these reasons, the rejections based on these references must fall as well.

In paragraph 26, page 13, in the first full paragraph, the examiner states that "process limitations do not impart patentability to the article claimed". While Applicant agrees with the general wisdom of this statement, the present situation does not fall within the stated circumstances. As discussed at the interview, these limitations, while appearing in the form of process limitations, actually constitute well-known structural features. In other words, one skilled in the art can well determine whether a container under examination resulted from injection molding, thermoforming, or other process. This ability to make this determination stems from the distinct structural appearance of the container so produced. Thus, although the words appear to constitute process limitations, they actually describe, with definitiveness and clarity, structural features. Thus, they may, as descriptions of structural features, impart patentability. In the present case, no one has suggested that containers distinctive of these processes but incorporating PCR's may still safely hold substances intended for human consumption. For these reasons as well, the claims appear to possess patentability over the cited references.

Applicant has reviewed the patents to Ofstein. He agrees with the examiner that they have less pertinence than the other cited art.

Applicant believes that the above should place his application in condition for allowance. However, if some minor impediment prevents this action, the examiner is then respectfully requested to telephone Applicant's attorney at the number given below. This would portend the saving of substantial effort and cost on the part of both the Patent and Trademark Office and Applicant. Applicant also expresses his appreciation to the examiner for her indication of allowable subject matter in the examined claims.

The present paper appears to require a two-month extension of time to respond to the May 1, 1998, Office action. Accordingly, enclosed is check no. 4879 of the undersigned attorney in the amount of \$400.00 to cover the two-month extension fee. Any required extension fee not paid by an enclosed check may be charged to Deposit Account 06-2135 of the undersigned attorney.

Respectfully submitted,



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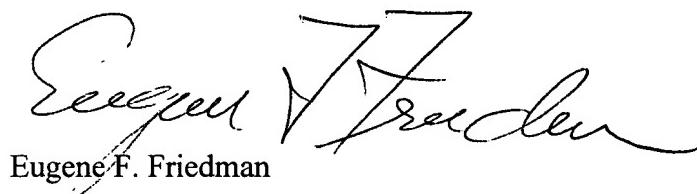
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CERTIFICATE OF MAILING

I certify that this correspondence is being deposited with the U. S. Postal Service as first class mail in an envelope with sufficient postage and addressed to:

The Assistant Commissioner for Patents
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on October 1, 1998.



Eugene F. Friedman

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